Class Certification: Relevance of Plaintiff's Finances and Fee Arrangements with Counsel (Comment)

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CLASS CERTIFICATION: RELEVANCE OF PLAINTIFF’S FINANCES AND FEE ARRANGEMENTS WITH COUNSEL

The class action is a means of combining in one lawsuit many small claims against a single defendant. Recent cases indicate a trend towards investigation of the financial resources and counsel fee arrangements of the representative plaintiffs and perhaps willingness to deny class certification when the court is dissatisfied with these financial factors. This Comment takes the position that financial concerns should be considered an issue in certification proceedings only in the unusual case where independent evidence raises serious doubts as to the representatives’ financial or ethical ability to prosecute the case vigorously.

I. INTRODUCTION

Use of the Federal Rule of Civil Procedure 23 (hereinafter Rule 23) class action device as a means of litigating multiple smaller claims is highly controversial. Defendants call it a “Frankenstein monster” which coerces favorable settlement despite the merits of the claim. Judges may view it skeptically as the lawyer’s pot of gold at the end of the rainbow, or conversely, as a crucial means of court access for small litigants. For many plaintiff representatives and class members, class actions are a necessary device for redressing individually small, but collectively large scale wrongs which would otherwise be immunized from correction by the high cost of litigating individual claims.

Given these diverse views on class actions, and Rule 23’s explicit certification prerequisites, it is not surprising that extensive time is spent in pre-certification procedural maneuvers. In order to be certified as a class action, a case must meet the requirements of 23(a) as well as fitting within one of the 23(b) categories.¹ Rule 23(a)

¹  FED. R. CIV. P. 23(a), (b). Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of
CLASS CERTIFICATION

requires: (1) class size rendering impracticable joinder of all potential parties; (2) common questions of law or fact; (3) typicality of claims or defenses between the representative and class members; (4) fair and adequate representation of the class by the representative party.

Relevance of the representative plaintiff's net worth and financial arrangements with counsel has become an issue under 23(a)(4). It has become a common practice for defendants to raise financial and ethical questions concerning a plaintiff's capability to represent the class adequately as a tactical defense to the class action prior to reaching the substantive issues.\(^2\)

The adequacy of representation requirement of Rule 23 has traditionally been evaluated by two criteria: whether the named plaintiff has any interests antagonistic to the class and whether plaintiff is represented by competent counsel who can be expected to prosecute the class interests vigorously.\(^3\) Recent cases indicate the possible infusion of two additional elements: plaintiff's ability to finance the suit and the ethics of financial arrangements with counsel.

The significance of plaintiff's financial resources has increased since the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*\(^4\) that the representative party must bear the costs of individual no-

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\begin{align*}
\text{(A)} & \quad \text{inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or} \\
\text{(B)} & \quad \text{adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or} \\
\text{(2)} & \quad \text{the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or} \\
\text{(3)} & \quad \text{the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.}
\end{align*}
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tice to absent class members. *Eisen* is predicated on Rule 23(c)(2), which requires the "best notice practicable" to class members in any action fitting within the (b)(3) monetary damages category. Class challengers extrapolate from dictum that Rule 23 notice requirements cannot "be tailored to fit the pocketbooks of particular plaintiffs." Essentially, defendants now seek to extend *Eisen* by adding plaintiff's ability to finance the litigation and to reimburse counsel for advanced costs as new criteria for adequacy of representation. These questions typically arise during pre-certification discovery or at the time for class determination.

It is clear that a plaintiff's ability to satisfy the *Eisen* notification requirement must be established prior to certification of a class. In many cases, particularly where individual claims are small, counsel for the class representative advances notice and other litigation expenses subject to the plaintiff's legal responsibility to reimburse counsel if the action is unsuccessful. Advancement of litigation expenses is a common practice in the legal community, especially in contingent fee cases where the client lacks immediate resources necessary to bring the action. If there is a favorable outcome, plaintiff's counsel is reimbursed out of the recovery. If the suit is unsuccessful, however, despite plaintiff's legal obligation to reimburse, this obligation is rarely enforced. Defendants frequently object to this practice, asserting that if class counsel does not reasonably expect reimbursement, it is unethically maintaining the suit. Thus, they seek discovery of plaintiff's net worth and fee arrangements; if plaintiff's resources are limited this provides another basis for urging denial of class certification.

The competing views on the importance of plaintiffs' financial status can be summarized as follows:

**Defendants' Arguments**

Defendants argue that class actions are an expensive, *in terrorem* device to which they should not be subjected without reasonable assurance that the case will be res judicata for the absent class members. Because adequate representation is the primary criterion for the res judicata effect, plaintiff should be able to demonstrate financial resources sufficient to prosecute the case vigorously. If plaintiff lacks such resources and counsel is in fact advancing costs

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5. *FED. R. CIV. P.* 23(c)(2).
6. 417 U.S. at 176.
without reasonable expectation of reimbursement, then class counsel is engaging in unethical maintenance of the suit. Such ethical violations render the representative party an inadequate representative, thus making the outcome vulnerable to collateral attack by the absent class members. In addition to their interest in the res judicata effect, defendants assert an interest in the collectibility of a possible judgment in their favor for costs and attorneys' fees. Without adequate resources, a plaintiff could harass a defendant with a frivolous class suit, hoping for a large recovery but being immune from financial recriminations if the suit fails. Defendant should therefore be allowed to have discovery of the representative plaintiff's financial resources.

**Plaintiffs' Arguments**

In response, plaintiffs argue that their financial resources are irrelevant to adequacy of representation, and thus are outside the permissible scope of discovery. Defense discovery motions are a strategic and dilatory effort to chill prosecution of the class claims. If courts allow this tactic, and require proof of plaintiff's ability to finance the suit or to reimburse counsel, class actions would effectively be available only to financially sound business interests or to the wealthy. This would subvert a primary purpose of Rule 23 in providing access to courts for plaintiffs of modest means who have collectively suffered a large scale harm though their individual damages may be small. Plaintiffs thus argue that when their financial resources are considered relevant to whether the class should be certified, defendants' large scale wrongs are unassailable because of the cost of litigation. With respect to any ultimate judgment for costs and attorneys' fees, plaintiffs assert that this issue is wholly unrelated to adequate representation. Class actions should be treated the same as other civil litigation, in which no discovery is permitted to insure that a potential judgment will be enforceable.

How courts have accommodated these conflicting interests thus far is the subject of the next section; how courts should resolve the conflicts is considered in subsequent sections.

**II. THE COURTS' RESOLUTION**

In addition to the legitimate considerations summarized above, some of the cases may reflect a basic judicial disfavor toward the inherent complexity of the class action device, sometimes tipping the scales in favor of broad discovery and against class certification.
A few of the cases which follow demonstrate financial facts which justify some type of inquiry; professional ethics may be so obviously implicated in an individual case that a court cannot conscientiously ignore the question.

While there are vast distinctions among the cases based on the size and type of class action and the peculiarities of the case, the cases can be separated into three categories. At one end of the spectrum courts have denied that plaintiff's finances or fee arrangement with counsel are relevant to the requirement of adequate representation. Defendants' discovery requests in this arena are summarily denied. At the other extreme, district courts evidence a willingness to enforce attorney ethical standards as part of the class certification process. These courts permit discovery of plaintiff's resources, arrangements with counsel, and the feasibility of reimbursement of advanced costs. Between these two extremes, the plaintiff's financial resources and agreement with counsel are relevant only as warranted by special circumstances indicating grounds for serious inquiry.

**Plaintiff's Finances and Fee Arrangements Irrelevant to Adequate Representation**

*Sanderson v. Winner,* decided by the Tenth Circuit, typifies the line of cases which deny that financial resources beyond the ability to pay notice costs have any relevance to the maintenance of a class action. In an antitrust action brought under Rule 23(b)(3), mandamus was issued against discovery of income tax returns and all agreements with counsel pertaining to litigation costs and attorneys' fees. The Tenth Circuit called the discovery order "an unwarranted extension of the Supreme Court's decision in *Eisen,* which extension would limit and curtail Rule 23 in a manner never contemplated." *Eisen* was not viewed as creating a presumption against class certification. Adopting a no-nonsense approach on such discovery tactics, the court stated:

> Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, *we address ourselves to the merits of the litigation.* We recognize that the class action is unique and we see the necessity for the court to be
satisfied that the plaintiff or plaintiffs can pay the notice costs, and we also agree fully with the Court's ruling in *Eisen* that due process requires decent notice. But we do not read *Eisen* as creating a presumption against finding a class action. Nor does it approve oppressive discovery as a means of discouraging a private antitrust action which, if meritorious, advances an important interest of the government.¹⁰

Arguments concerning adequacy of representation were quickly dismissed, as neither the trial court nor defendants had any legitimate interest in the propriety of the fee arrangement. Also held irrelevant was the ability to pay a possible judgment for costs, for in that respect the court saw "no difference between the case at bar and any other lawsuit."¹¹

Cases prior to *Sanderson* adopted similar positions. For example, in *Bogosian v. Gulf Oil Corp.*,¹² an antitrust action, Judge Lord denied discovery of plaintiff's net worth, fee arrangements, and his ability to satisfy a judgment for costs if the case was unsuccessful. The information sought was "not relevant to the subject matter of the lawsuit,"¹³ and thus outside the scope of discovery under Rule 26(b)(1). The court in *DeMilia v. Cybernetics International Corp.*¹⁴ also denied financial discovery, on the basis that it was irrelevant to adequate representation; plaintiff's expected forthrightness and vigor was the primary criterion for that requirement. Allowing plaintiff's financial status to defeat class certification would have contradicted the theory of class actions by permitting multiple litigation of small claims. *Kleinman v. Sibley*,¹⁵ a securities fraud case subsequent to *Sanderson*, also rejected the relevance of finances and fee arrangements. If the other requirements of Rule 23 were met, then these matters were outside the proper scope of discovery. Judge Fullam raised the question of standing to challenge financial adequacy: "Indeed, a strong argument can be made that, where plaintiff is represented by competent and experienced counsel, parties aligned in opposition to the class should not be accorded standing to challenge the adequacy of the named plaintiff as a representative of the class."¹⁶

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¹⁰. Id. at 479-480 (emphasis added).
¹¹. Id. at 480.
¹³. Id. at 1230.
¹⁶. Id. at 63.
Other district courts have summarily denied discovery on the basis of *Sanderson*. In *West v. Capitol Federal Savings & Loan Association* the judge concluded, with a noted impatience concerning defendant's financial discovery requests, that the case should lag no more.

**Plaintiff's Finances and Counsel's Ethics Relevant to Adequate Representation**

At the other end of the spectrum, there is an evolving body of case law which finds such financial inquiries to be generally relevant. Once courts determine relevancy they may be willing to police ethics vigorously, limit class size in accordance with available resources, or deny certification entirely.

Although the decision to limit class size in accordance with available resources may be correct on the facts, the opinion in *P.D.Q. Inc. v. Nissan Corp.* portends a broader view on the relevance of plaintiff's financial status. Though acknowledging the propriety of advancing litigation costs, the court indicated it would examine financial ability to reimburse counsel. The plaintiffs in these consolidated antitrust cases sought to represent a nationwide class of Datsun purchasers. One such purchaser stated he was unwilling to spend more than a thousand dollars to litigate, and a corporate plaintiff stated it was unwilling to borrow up to $100,000 to reimburse counsel for advanced costs should the action fail. In addition, counsel for plaintiffs agreed only to advance limited funds. The district court discussed the question of advancements and concluded it was a necessary evil to be permitted only when the suit could not otherwise be brought. However, the court indicated it would look beyond a mere statement of the clients' assumption of reimbursement liability to see if they were willing and able to fulfill that commitment. After permitting such inquiry, the judge certified a smaller class limited to a geographical area so the merits of the claims could be considered.

In *Ralston v. Volkswagenwerk, A.G.*, the district court re-

18. It appears that courts which summarily deny these discovery requests do not submit the brief orders for publication, thus limiting accessibility to the cases.
required the named plaintiffs to show sufficient resources to complete the lawsuit independent of contributions from class members. Class certification was denied after nine days of certification hearings because the named plaintiffs could not show the necessary financial resources, statistical data did not establish typicality of claims, and other Rule 23 requirements also were stringently applied. Plaintiffs, including a law professor, indicated they were willing and able to provide notice to a class of 18,000 members and stated they had available $15,000 to litigate the case. Estimating current expenses and projected notice costs, the court concluded that the remaining $8,000 was insufficient to pursue the action to completion. Certification of a class action was to be granted only when it was assured that the plaintiffs were prepared to shoulder the financial burden: “In order adequately and fairly to represent the interests of the class, the named plaintiffs must sustain the burden of showing that their resources are adequate to pursue this lawsuit to completion, even in the absence of any additional financial contributions from members of the purported class.”

Although this court would have permitted the pooling of plaintiffs’ resources, it held that such action should have been taken before the suit was filed without reliance on court processes to “coagulate a class who may be willing and able to underwrite the action.”

Some courts have evidenced a willingness to police ethics of class counsel vigorously. For example, in *Stavrides v. Mellon National Bank & Trust Co.*, Judge McCune compelled answers to deposition questions concerning, *inter alia*, whether plaintiffs understood their obligation to reimburse counsel for advanced costs. This was allowed so defendants could “seek to establish unethical conduct.” The court perceived that class actions are subject to abuse through unethical solicitation of clients and maintenance of the case, and consequently promised to assert vigorously its “‘broad administrative as well as adjudicative power’ to assure [itself] that there [was] no ethical misconduct involved . . . before granting class status.”

Concern with assuring an ethical lawyer-client relationship prior to certification was also evident in *Rode v. Emery Air Freight*

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21. *Id.* at 433.
22. *Id.* at 434.
24. *Id.* at 636.
25. *Id.* at 637 n. 6.
Although class counsel had agreed to advance litigation expenses subject to plaintiff's reimbursement obligations, defendant was allowed discovery of plaintiff's net worth to determine whether plaintiff's obligation to reimburse advanced costs was illusory. Judge Teitelbaum considered it crucial to reestablish the aggrieved party as the focal point of litigation; he perceived abuse of the class action device from the "substitution of plaintiff's attorney for the representative plaintiff . . . [or class] as the real party in interest in class litigation." The court also expressed concern that class counsel not utilize an indigent plaintiff so as to make statutory award of attorneys' fees to a prevailing defendant meaningless.

The court determined that defendants should not be subjected to great class action litigation expenses without some assurance of recovering their costs if the action were frivolous; the purpose of statutory attorneys' fees to penalize frivolous suits ". . . would be completely abrogated if financial data of the representative plaintiff were deemed irrelevant." In addition, counsel's advancement of litigation expenses presented a potential danger to adequate representation:

[T]he attorney is able to assume primary control over the lawsuit. At any point in time where the desires of the representative plaintiff differ from those of his counsel, the threat of fund revocation, whether express or implied, could serve to coerce the representative plaintiff into complying with his attorney's position. The result of advancing litigation costs is that the Rule 23 responsibility of adequately representing the class becomes entrusted to the attorney rather than the litigant.

Factual Particularities Determine Relevance of Plaintiff's Finances and Counsel's Ethics

An intermediate category of cases avoids application of a broad rule of relevance or irrelevance. These courts generally follow Sanderson, but may conduct in camera examination or permit limited discovery of either fee arrangements with counsel or ability to pay notice costs.

27. Id. at 230.
28. Id. at 231.
29. Id. at 232.

After court-ordered production of plaintiff's tax returns, defendant moved for denial of class certification on grounds of her inadequacy as class representative. On November 3, 1978 this motion was denied. However, in order to balance defendant's potential interest in attorney's fees with the need to insure access to the class action device to persons who are not affluent, the court limited discovery from the nationwide basis sought to the Western District of Pennsylvania. 18 Fair Empl. Prac. Cas. (BNA) 695 (W.D. Pa. Nov. 3, 1978).
They consider plaintiff's financial resources irrelevant to adequate representation unless they are clearly insufficient and counsel is not advancing costs. Where there is an advancement agreement, these courts have refused to police counsel ethics absent independent evidence of impropriety.

In *MacLean v. Honeywell Information Systems, Inc.*, the plaintiff sought to represent a world-wide class of female employees in a Title VII action. Although discovery was granted only of plaintiff's ability to pay *Eisen*-required notice costs, the court noted that “of course, it [was] proper for counsel to advance [these expenses] subject to later reimbursement.” Presumably, counsel could establish the ability to advance funds in an affidavit. Similarly, *Brown v. Senex Corp.* followed *Sanderson* on the import of plaintiffs' finances, but permitted questions on “their fee arrangement with counsel and of their responsibilities for costs and notice expenses so long as these questions do not invade the attorney-client privilege.”

In *Sayre v. Abraham Lincoln Federal Savings & Loan Association* counsel agreed to advance all litigation costs, subject to plaintiffs' responsibility to reimburse counsel if the case was lost. Defendants sought discovery of the plaintiffs' financial ability and willingness to reimburse these costs, asserting that if there was not a reasonable expectation of repayment, counsel was unethically maintaining the suit, therefore rendering plaintiffs inadequate representatives. Judge Newcomer rejected these arguments, believing that advancements were a predictable element of class actions. While counsel's ability to advance costs was relevant, the mere fact that advancements exceeded plaintiffs' resources was not cause for class denial:

> It is this Court's judgment—admittedly based on experience and hunch rather than any collected empirical data—that to deny a class whenever plaintiff's counsel advances significant funds to plaintiffs of little or modest means would be to defeat the very purposes which class actions were designed to achieve. This is particularly true where, as here, the costs of litigating the suit would exceed the damages allegedly sustained by an individual plaintiff.

31. *Id.* at 1016. Pursuant to local rules, such discovery motions are decided by a magistrate appointed by the trial judge.
32. *Id.*
33. *Id.*
In other words, in precisely those cases where the class action device is most appropriate the disparity between the costs of litigation and the resources of the individual plaintiffs will be most pronounced. As much as we are concerned with possible unethical conduct by counsel, we cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich.\textsuperscript{35}

Absent compelling, independent evidence of improper maintenance, enforcement of attorney ethical standards was the disciplinary board's task. Therefore the court concluded that costly and time-consuming discovery to ensure counsel ethics should not be permitted as part of the certification process.

One case has adopted the suggestion in \textit{Sayre} concerning counsel's financial ability to pursue a class action. Although the district court in \textit{Guse v. J.C. Penney Co.}\textsuperscript{36} indicated a willingness to permit some inquiry, defendant was required to do more than raise unsubstantiated doubts as to counsel's financial ability. If such unsupported concerns were brought into issue, an affidavit by plaintiff's counsel indicating adequate financial status would suffice.

Several cases in this intermediate category consider the plaintiff's financial resources relevant only where there are special circumstances directly bearing upon adequate representation. For example, the plaintiff in \textit{Held v. Missouri Pacific Railroad Co.}\textsuperscript{37} indicated that she pursued class settlement negotiations in part because of personal financial difficulties. Class certification and settlement approval were denied because it appeared she lacked necessary funds for notice and litigation, and because of a marked personal antagonism to the absent class members.

In \textit{National Auto Brokers Corp. v. General Motors Corp.},\textsuperscript{38} certification was precluded by plaintiff's overall weak financial condition, a large deficiency judgment, and conflicts with class members indicating interests antagonistic to those of the class. Other special circumstances were present in \textit{Elster v. Alexander},\textsuperscript{39} where the plaintiff was elderly and retired. He sought to represent a large class, and had similar suits pending in other jurisdictions, thus

\begin{itemize}
\item \textsuperscript{35} 65 F.R.D. at 385.
\item \textsuperscript{36} 409 F. Supp. 28, 30-32 (E.D. Wisc. 1976), rev'd on other grounds, 562 F.2d 6 (7th Cir. 1977). Plaintiff's counsel was the Milwaukee Legal Services, which perhaps qualify as special circumstances justifying inquiry into counsel's financial ability.
\item \textsuperscript{37} 64 F.R.D. 346 (S.D. Tex. 1974).
\item \textsuperscript{38} 376 F.Supp. 620, 636-38 (S.D.N.Y. 1974). Actual or potential conflicts between plaintiff and the class were perceived because several cases had been instituted by class members against the named plaintiff.
\item \textsuperscript{39} 74 F.R.D. 503 (N.D. Ga. 1976).
\end{itemize}
giving credence to defense contentions of a strike suit. In allowing
discovery, the district court found that “[i]n light of the circum-
stances in the instant action the plaintiff’s financial ability to
‘vigorously prosecute’ . . . is relevant to the adequacy of his pur-
ported representation of the class.”

The decision to certify the class in *In re Toilet Seat Antitrust
Litigation* is also in accord with the notion of limited relevance. The
court rejected “[d]efendants’ implication that plaintiffs must
‘prove’ their financial capability,” as “[this] broadens the require-
ments of Rule 23 to unreasonable proportions.” Since plaintiffs
stated their willingness and ability to pursue the litigation, the class
was certified subject to the court’s power of modification were it to
appear that the case would become unmanageable for the represen-
tatives.

III. THE SIGNIFICANCE OF FINANCIAL CONSIDERATIONS

Financial responsibility must be viewed in perspective, as part of a
debate based on economic principles. A primary goal of defendants
is avoiding class certification and therefore the merits of the class
claims. If they succeed in preventing certification, the threat of a
coercive settlement is nonexistent. If a class is to be certified, defen-
dants want some assurance that they will not be subjected to the
expense of litigating or settling class claims without binding all
absent class members.

If Rule 23 is to be used effectively for enforcing federal policy,
the economic realities of acting as class plaintiffs’ counsel must be
recognized. Litigating a class claim is an expensive, time-consuming
and very speculative proposition. Because of the cost and special-
ized skills required, fewer attorneys are willing to undertake repres-
tation of the claim. One writer has vividly described the head-
aches involved in class representation:

> Long and arduous legal labors and the high order of professional devo-
tion, tact, and skill required to adequately represent a class of people who
may be largely unknown to him and to one another are only two of the things
required of the attorney. Expertise is often necessary in supplementary areas
of supporting investigation, research and discovery related to finance, ac-

40. *Id.* at 505.
42. *Id.* at 69,004.
counting, scientific and business practices and many other fields. In addition, there are the burdens of dealing with many client members of a class, the unusually detailed record-keeping needed to meet the burden of accountability, and the investment (with no certainty of recovery) of huge quantities of time, energy and money over what may be a long period of time before there is any possibility of return. Add to that the concern for the availability of means to pay notice and administration costs and the nearly invariable high quality of the legal opposition fielded by financially responsible defendants, and it becomes clear that the lot of the attorney for the class is no bed of roses.

In short, this is not a race for the short-winded at all. It may even turn out to be a situation where a profitless case must be carried through to a conclusion because of its quasi-public nature—like having a tiger by the tail.

Therefore, what may appear to be generous treatment by a court in fixing a fee may in fact be but the minimum necessary to balance out the many deterrents lawyers have to undertaking class actions.\textsuperscript{44}

In addition, when deciding whether to allow increased procedural barriers to certification, district courts should consider the possibility that, by being able to create a certification furor, defendants exacerbate an already present problem—the complexity and high cost of litigating a class action suit. Every strategic defense motion requires a response by the plaintiffs and the court, thereby successfully delaying attention to the merits of the case.

\textbf{The Significance of Federal Policy}

Simplifying litigation was a principal reason for adoption of the Federal Rules of Civil Procedure. Rule 1 provides that all rules are to "be construed to secure the just, speedy and inexpensive determination of every action."\textsuperscript{46} This policy of simplified, effective litigation is manifest in the operation of the pleading and discovery rules. Rule 23 has a similar objective, though it has not been as successful in its operation.

Rule 23 was designed to be economically efficient in adjudicating only once a problem common to many people:\textsuperscript{48}

The surest way to guarantee the consistency of class action procedures and substantive policies is to ground the justification for the procedures in the policies themselves. On this view, the increased access to courts that class actions make possible is justified because it allows the policies underlying the claims enforced in a class suit to be given effect in situations in which this would not otherwise be the case.\textsuperscript{47}

\textsuperscript{44} Id.
\textsuperscript{45} Fed. R. Civ. P. 1.
\textsuperscript{47} Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1359 (1976). This
Because single claims are often of small economic value, the class action device is necessary for adequate enforcement of antitrust, securities, civil rights and environmental laws. In addition to the congressional encouragement of class action by providing prevailing plaintiffs statutory attorneys' fees, last term the Supreme Court in Christiansburg Garment Co. v. EEOC, unequivocally re-affirmed the important "role of a 'private attorney general,' in vindicating a policy that Congress considered of the highest priority..." The Court held that prevailing Title VII defendants are only to be awarded attorneys' fees upon a strong showing that the claim was frivolous or unreasonable.

These two federal policies—efficient litigation of multiple claims and enforcement of federal law through private attorneys general—are significantly related to questions of plaintiff's financial responsibility:

In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.

Should plaintiff's financial status evolve into an additional criterion for certification, many large scale wrongs, though intangible or of small monetary value, would go unremedied. The underlying policies of class actions would thereby be subverted.

Streamlining litigation is also a principal purpose of the discovery rules. Broad discovery is allowed to avoid trial by surprise and to minimize the need for judicial intervention. The scope of discovery is therefore broadly defined in Rule 26(b)(1) as "any matter, not privileged, which is relevant to the subject matter" of the case, relating to the claim or defense of any party. Information is discoverable if it is relevant and "appears reasonably calculated to lead to the discovery of admissible evidence."

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48. H. Newberg, Newberg on Class Actions § 1010.5g at 47 (1977).
49. 98 S. Ct. 694 (1978).
50. Id. at 698.
51. Id. at 701.
52. Escott v. Barchris Construction Corporation, 340 F.2d 731, 733 (2d Cir. 1965).
54. Id.
Insurance policies are a notable exception to the above proviso. Rule 26 was amended in 1970 to allow discovery of insurance agreements which may be used to satisfy a possible judgment. While still inadmissible at trial because public policy precludes its legal relevance, discovery is allowed to facilitate realistic settlement appraisal. Distinguishing insurance coverage from personal financial status, the Advisory Committee noted that the former is discoverable because it is an asset created to satisfy claims; litigation is controlled by the insurer; and it does not entail a significant invasion of privacy.5

IV. SUGGESTED ANALYSIS OF THE ADEQUACY ISSUE

Should a class plaintiff’s personal finances and fee arrangements with counsel be considered relevant to adequate representation? Unlike insurance, the representative plaintiff’s personal financial data are not useful in facilitating settlement. Financial status of a party is only discoverable in limited circumstances, such as where income is directly at issue in the litigation. Absent such appropriate circumstances, courts disfavor compulsory production of financial information because of policy concerns for privacy.56 As a general rule a civil litigant cannot discover an opponent’s ability to pay a possible judgment unless there is a claim for punitive damages.57 If there is no such claim, plaintiffs must await judgment and execution. There is no reason why class actions should be treated differently than other civil litigation. This principle should preclude class action defendants from discovering plaintiff’s ability to satisfy a possible judgment for attorneys’ fees.58

A court’s certification decision cannot be viewed solely on the basis of the relevance of plaintiff’s financial and counsel’s ethical ability to represent the class adequately. Defense arguments on relevance comprise part of an overall tactic of “raising such a flurry of challenges” that courts will opt for class denial.59 This Comment takes the approach that many such certification challenges should be reviewed summarily and denied. Judicial impatience with dila-

58. This is especially true given the double standard for such awards in Title VII cases, as approved in Christiansburg Garment Co. v. EEOC, 98 S. Ct. 694 (1978).
tory motions would alleviate management problems and permit prompt attention to the merits. Decrease in pre-certification battles would consequently decrease class action expenses, and perhaps reduce the coercive effect of class certification. In this manner federal policies could be fairly effectuated—based on the merits and not merely on procedural considerations.

The Third Circuit tests adequate representation by considering two factors: ability, qualifications and experience of plaintiff’s counsel, and the absence of antagonistic interests between the representative and class members. If a plaintiff is otherwise adequate, a presumption of financial adequacy should be applied absent reliable information to the contrary. Where class counsel is conducting the suit competently, and there is no specific indication of ethical violations, it should be presumed that counsel is acting ethically. Defendants must rebut these presumptions with sufficient, independent information in order to compel discovery of financial or ethical adequacy.

In the alternative, the trial court could require the plaintiff to submit, for the court’s private consideration, affidavits and documents concerning finances and arrangements with counsel. The latter approach would permit court supervision over adequacy of representation without undue privacy invasions or motions designed for delay or avoidance of the merits. Where financial adequacy is doubtful but the class is otherwise appropriate, there should be a strong presumption favoring certification. Only when it is beyond question that neither the class plaintiff nor counsel can finance litigation should financial adequacy be grounds for class denial.

Of the cases reviewed above, those that determined relevance by considering individual factual situations most closely approximate the suggested approach. Cases such as Sayre, Held, and Elster can be interpreted together as standing for the following proposition: plaintiff’s financial resources and ethical questions of advancements are legally irrelevant as a matter of policy absent independent information of special circumstances bearing on adequate rep-

61. See generally Newberg, supra note 48, § 2098, at 600-05.
62. The district court in Waldman v. Electrospace Corporation, 68 F.R.D. 281 (S.D. N.Y. 1975) rejected discovery on plaintiff’s ability to finance notice and other litigation costs; “[t]he appropriate discovery, however, where called for, is not discovery by defendants. . . ., but plaintiffs’ submission to the court in camera of affidavits on this issue.” Id. at 287 (emphasis added). See also Uniform Class Actions [Acr] § 17(a), providing for submission of fee and advancement agreements upon direction by the court.
representation. These district courts have appropriately reconciled defendant's interest in a secure final judgment, the due process rights of class members, and the federal policies underlying class actions.

*Sanford* and its progeny may be criticized for ignoring the due process claims of class members and defendants and fiduciary obligations of the class representative.\(^6^3\) Cases at the other end of the spectrum, such as *Ralston* and *Rode*, are also vulnerable and may reflect judicial hostility toward the class action device. If plaintiff's financial resources are generally relevant to adequacy and therefore discoverable as grounds for class denial, many meritorious federal claims could be denied certification. Rather than protecting class due process interests, this approach could deny any forum whatsoever for the absent class members. As a practical matter, even the named plaintiffs who have small claims on complex issues may be precluded from any remedy that reasonably redresses their injuries.

**Due Process Aspects of Res Judicata**

Rule 23 provides for res judicata extending to all class members, except those "opting out" of 23(b)(3) actions.\(^6^4\) Two arguments for this broad effect are: defendants' interest in a secure judgment, interrelated with the class' due process right to adequate representation, and the judicial efficiency effected by prevention of multiple litigation.\(^6^5\) It has been suggested that undue focus on res judicata "raises the risk that a court hearing a class suit will attempt to protect its judgment by deciding class action issues in a way which would provide [another court] with 'bright line' evidence of adequate representation, such as individualized notice, even if such decisions were not in fact necessary."\(^6^6\) Perhaps the cases permitting discovery of financial adequacy and financial ethics indicate a similar desire for such bright line evidence.

It is clear that Rule 23 does not alter the principle that a trial court cannot predetermine res judicata effect; this can only be done in a subsequent collateral attack.\(^6^7\) The latter inquiry is two-pronged: whether the trial court was initially correct in determining

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63. See generally Comment, 31 U. MIAMI L. REV. 651 (1977). This work takes a contrary position on the issue of financial responsibility under Rule 23(a)(4).
64. See text of Rule 23, supra note 1.
65. HARV. L. REV., supra note 47, at 1396.
66. HARV. L. REV., supra note 47, at 1399-1400.
that the representatives would represent the class adequately; and whether there was adequate representation in fact. The primary criterion for this hindsight evaluation is "whether the plaintiff, through qualified counsel, vigorously protected the class interests." But the fact that a reviewing court may look into the adequacy-in-fact of the representation does not mean that the certifying court should deny class representation based on what it predicts a later review will show. That is, speculation concerning the adequacy of plaintiff's finances and projected litigation costs should rarely be determinative on the class certification issues. Determination of the financial adequacy issue should properly be left to the reviewing court.

Some scholars have argued that the prior determination should have only a limited res judicata effect. They contend that application of stare decisis would achieve the same judicial economy, while allowing class members the same opportunity as other litigants to urge that the policies have changed, and that the former rule of law should be rejected. If the law has remained static, stare decisis would operate as a bar; as class attorneys are paid only if successful, they would be unwilling to relitigate a prior sound judgment.

If defendants' interest in a secure judgment can thus be protected, their claims for pre-certification assurances of adequate representation are greatly diminished. Nor can demands for pre-certification financial assurances be justified on defendants' interest in recovery of statutory attorneys' fees. This is necessarily decided after judgment for defendant, and even then is highly speculative.

In comparison, the due process interests of class members are implicated at the outset. If certification is denied for inadequate representation, be it financial or ethical, the probability is great that class claims will never have their day in court. Because adequate representation must ultimately be decided after the fact, the class' immediate interest in court access outweighs defendants' subsequent interests. This balance warrants great circumspection on issues of financial and ethical adequacy. Facilitating access to federal courts is a primary function of modern class actions; attorneys' fees based on the aggregate benefits to the class "can break the connection between access to courts and financial wherewithal." Allowance of financial and ethical adequacy as matters generally

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68. Gonzales v. Cassidy, 474 F.2d 67, 72-75 (5th Cir. 1973).
69. See generally HARV. L. REV., supra note 47, at 1396-1400.
70. See discussion of Christiansburg Garment in text accompanying notes 49-51, supra.
71. HARV. L. REV., supra note 47, at 1363-64.
discoverable and relevant to certification resurrects that connection, effectively creating a presumption against adequate representation, and therefore against class certification. If the presumption is reversed so that an otherwise proper representative is presumed financially and ethically adequate, the actual due process claims can be decided without unduly restricting court access.

Professional Responsibility

A few of the decisions discussed above indicate varying degrees of willingness to enforce ethical standards relating to suit maintenance and solicitation in pre-certification proceedings. This section will identify the particular ethical considerations implicated by inquiries into the plaintiff's financial responsibilities and resources. Analysis of this matter focuses on the appropriateness of three factors: the interests sought to be protected; the stage of litigation in which the various interests can be asserted; and the proper forum for review of alleged ethical violations.

Disciplinary Rule 5-103(B) of the Code of Professional Responsibility prohibits a lawyer from acquiring a proprietary interest in the outcome of litigation, but permits advancement of litigation expenses, "provided the client remains ultimately liable for such expenses." Questions of unethical conduct by counsel concerning the financing of class action litigation are directed at maintenance proscribed by DR 5-103(B) and at solicitation of class members. Class challengers assert a right to discover the class plaintiff's financial resources and the content of the fee arrangement as an assurance that the legal obligation to reimburse advanced costs is not illusory and therefore in violation of the disciplinary rule.

The general rule against attorney maintenance of a suit is designed to protect the client's right to maintain control over the conduct of the cause of action. It is thought that when an attorney acquires a proprietary interest in the outcome, counsel will be enabled to direct the course of the proceedings in ways that might not be in the client's best interests. In dealing with class actions, how-

72. ABA Code of Professional Responsibility, DR 5-103(B) states in full: While representing a client in connection with contemplated pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and cost of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. See also EC 5-7, 5-8.

ever, it is inappropriate to apply this reasoning “by simply substituting the words ‘named plaintiff’ for ‘client.’”74 In class actions, the named plaintiff is not the only plaintiff. If, at some point in litigation the interests of the named plaintiff diverge from those of some class members, exclusive control of litigation by the named plaintiff would deny the class members effective representation. Further, because award of attorneys’ fees is contingent on success, class counsel always has a monetary stake in the outcome: “Since class actions may in some circumstances be impractical or improper absent maintenance, the justification for banning the practice must be measured against the justification for class actions in general—full realization of substantive policy.”75

A realistic appraisal of litigation expenses and plaintiff’s probable stake in the outcome indicates that advancements are a necessary concomitant of the majority of class actions. Rule 23’s policy to permit access to courts for vindicating federal law will be severely restricted if the requirement of adequate representation is interpreted to require proof that the named plaintiff, or an existing group of class members, are willing and able to reimburse counsel for advanced costs. In that event, class actions will be limited to cases in which a wealthy but very foolish class member agrees to assume potential liability far in excess of any damage recovery that he may obtain as a class member. No odds in favor of victory are likely to compensate for the disparity between what the class representative risks losing and what he stands to gain personally. Class actions on behalf of predominantly low-income persons would be out of the question except where some source of outside financing, other than counsel, is available.76

The extent of defendants’ interest in raising pre-certification allegations of unethical maintenance should properly be viewed as a matter of timing. As discussed above in the section on res judicata, the class interests in certification are immediate, while defendants’ strongest interests arise and can finally be determined only at the end of the case. Because defendants’ primary concern during pre-certification stages is with denial of the action, it is illogical to allow them standing to compel discovery or defeat certification based on a possible violation of the maintenance proscription. Discovery of financial resources at the pre-certification stage, at least on the ground of policing professional responsibility, requires at least two

74. See generally HARV. L. REV., supra note 46, at 1592-93, 1604-23.
75. Id. at 1621-22.
76. 4 CLASS ACTION REPORTS 617, 621 (1975).
speculative assumptions: first, that the eventual costs of the litiga-
tion will exceed the plaintiff's resources; and second, that the plain-
tiffs will ultimately lose on the merits so the duty to reimburse is
activated. While it is clear that class actions are unique, and thus
justify closer policing of ethical standards, it is highly questionable
whether defendants are the proper participants to raise such ques-
tions. Defense motions directed towards discovery of compliance
with ethical standards should be granted only where there is inde-
pendent evidence of a serious ethical violation which could undercut
the stability of a final judgment. Conversely, summary denial of
motions unsupported by such evidence would discourage similar
dilatory and strategic motions.

It is clear that courts should be concerned with the ethical
conduct of attorneys appearing before them, whether or not in the
class action context. Two questions arise with respect to possible
violations of the maintenance proscription: For class actions, is ad-
vancement of costs without a reasonable expectation of reimburse-
ment unethical? If so, to what extent, if any should a court properly
police the situation?

There are significant bases for asserting that such advance-
ments are not unethical. The ABA Committee on Ethics and Profes-
sional Responsibility has stated that counsel may ethically advance
class litigation expenses so long as the named plaintiff has assumed
the legal responsibility to reimburse. The obligation to reimburse
need not have been discussed with the client, for the assumption of
liability is a legal and not an ethical question.\(^7\)

A recent opinion by the Third Circuit Court of Appeals indi-
cates that restrictions based on perceived ethical violations must be
consistent with the policies of Rule 23. In *Coles v. Marsh*\(^78\) mandate-
mus was issued against enforcement of a broad order restricting the
class plaintiff and her counsel from communicating with class mem-
bers for solicitation of litigation expenses or participation in the
suit. Plaintiff's activities, though arguably unethical, were not an
abuse of the class action device, but rather "were directed toward
effectuating the purposes of Rule 23 by encouraging common partic-
ipation in the litigation."\(^79\) Citing *Rodgers v. United States Steel*
the Third Circuit reiterated that there is neither a general grant of legislative authority to regulate the practice of law, nor is there a federal common law offense of barratry. Though not explicitly stated, it may be inferred that there is also no federal common law offense of solicitation or maintenance. If that is so, district courts should carefully circumscribe their efforts to police compliance with these ethical standards by weighing the policies of Rule 23 against the severity of the threatened violation.

It must also be noted that attorneys frequently advance litigation expenses subject to the client's contractual obligation to reimburse, although this obligation is rarely enforced. This occurs in the overwhelming proportion of plaintiffs' personal injury litigation conducted on a contingent fee basis. If the action is successful, advancements are reimbursed from the judgment. Clearly it is not the normal practice for plaintiffs' attorneys to seek reimbursement from their unsuccessful clients. If this practice constitutes a violation of DR 5-103(B), it has not been enforced by local disciplinary committees.

This raises the second question asked above: whether courts are the proper forum for enforcing DR 5-103(B), and if so, how they should accomplish this? Local disciplinary committees exist to enforce ethical standards, and they undoubtedly make their decisions in accordance with their understanding of common legal practices in the community. It is therefore unlikely that a disciplinary committee would find that any advancements, including those made in a class action, are violative of ethical norms. Though it is suggested that the disciplinary committee is the most appropriate forum for questions of professional responsibility, the interest of a district court in supervising the ethical conduct of a class action cannot be disputed. In presiding over a class action, the court is obligated to insure that the requisites of Rule 23, including adequate representation, have been met, and to provide a forum for the litigation of the cause of action asserted by plaintiffs. The court's interest in the ethical aspects of an advancement agreement can be protected without allowing discovery beyond the scope of relevance defined by Rule 26. If an answer to an appropriate inquiry, one relevant to the merits of the action, elicits a response indicative of unethical main-

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81. 560 F.2d at 188 (1977).
tenance, the court may then allow discovery on the plaintiff’s legal responsibility to reimburse counsel. There is little justification for allowing broad discovery to police strict compliance with ethical standards; only the most egregious misconduct by class counsel permits denial of certification on the grounds of inadequate representation. Nevertheless, a court may legitimately require the plaintiffs to submit affidavits and documents on fee arrangements in order to determine for itself that the plaintiff has assumed the contractual obligation to reimburse advanced costs. Since such items may be within the attorney-client privilege, any inquiry should be privately conducted, without participation by defense counsel.

V. CONCLUSION

Few practitioners in the field would dispute that class actions have become procedural nightmares. Pre-certification procedures must be simplified if Rule 23 is to be implemented in accordance with its underlying policies. The trial court has sufficient discretionary authority to examine privately the propriety of financial arrangements with counsel. It should not however, seek bright line assurances that the named plaintiff is financially able to pursue the suit to completion or to reimburse counsel for advanced expenses. This would unduly restrict effective use of the class action device. As a general principle, a defendant who seeks to discover financial data pursuant to Rule 23(a)(4) should be required to present independent information sufficient to overcome a presumption that an otherwise adequate plaintiff is also financially and ethically adequate. Defendants’ pre-certification interest in a judgment secure from collateral attack is not sufficiently immediate to warrant a broader rule of discovery:

So long as American judges remain committed to granting the essentials of the process that is due, we may hope to find that the new dimensions of Rule 23 should serve to further rather than impede the objective of all the Rules as it is stated in the first of them—“to secure the just, speedy, and inexpensive determination of every action.”

Judith L. Maute

82. See Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931 (7th Cir. 1972) (where class counsel solicited potential class members via mail).